NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 31 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RUBEN ORTIZ,

Petitioner - Appellant,

v.

SILVIA GARCIA, Warden,

Respondent - Appellee.

No. 05-55101

D.C. No. CV-03-01215-DOC

MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Submitted August 14, 2006[**]
Pasadena, California

Before: KOZINSKI, O'SCANNLAIN, and BYBEE, Circuit Judges.

Ruben Ortiz appeals the district court's denial of his petition under 28 U.S.C. § 2254 for a writ of habeas corpus. We omit the relevant facts as they are known to the parties.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Ortiz argues that his trial counsel rendered ineffective assistance because she failed to present additional eyewitness testimony. We disagree. The testimony Ortiz suggests should have been presented would have been cumulative, not probative, and of suspect credibility. Deputy Galvan's account was corroborated by his contemporaneous radio transmission, his injuries, the medical treatment he received, and Ortiz's having been arrested without a shirt. Further, Ortiz's speculation that counsel could have located other witnesses avails him nothing. *See United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987). Accordingly, we are persuaded that there is no reasonable probability that, absent the alleged errors by counsel, the jury would have had a reasonable doubt respecting Ortiz's guilt. *See Strickland v. Washington*, 466 U.S. 668, 694–96 (1984).

Ortiz also argues that counsel rendered ineffective assistance at sentencing by failing to present mitigating evidence in the form of testimony from family members. *See Jackson v. Calderon*, 211 F.3d 1148, 1164 (9th Cir. 2000) (applying *Strickland*'s standards to a claim involving the penalty phase). Again, we disagree. The testimony Ortiz's relatives provided at the district court hearing did not reveal any extraordinary circumstances or show Ortiz to be outside the spirit of the three strikes scheme. *See People v. Williams*, 948 P.2d 429, 437 (1998); *People v. Strong*, 104 Cal. Rptr. 2d 490, 497 (Ct. App. 2001). Ortiz seems to be the kind of

"revolving-door" defendant for which the three strikes law was designed. *See Strong*, 104 Cal. Rptr. 2d at 497. There is therefore no reasonable probability that the trial court would have exercised its limited discretion to strike any of Ortiz's prior serious or violent felonies. In the same vein, we are persuaded that the trial court would not have exercised its authority to reduce the present offense to a misdemeanor, as nearly all of the relevant factors militate against such leniency. *See People v. Superior Court (Alvarez)*, 928 P.2d 1171, 1177-79 (1997). Ortiz's claim must then fail, as he cannot show that he was prejudiced by the alleged representational errors. *See Strickland*, 466 U.S. at 694–96.

AFFIRMED.